

Members

Sen. Richard Bray, Chairperson  
Sen. Joseph Zakas  
Sen. John Broden  
Sen. Timothy Lanane  
Rep. Linda Lawson, Vice-Chairperson  
Rep. Ryan Dvorak  
Rep. Kathy Richardson  
Rep. Eric Koch  
Chief Justice Randall Shepard  
Thomas Felts  
David Whicker  
Kevin Kubash  
Jacqueline Rowan



## COMMISSION ON COURTS

*Legislative Services Agency*  
200 West Washington Street, Suite 301  
Indianapolis, Indiana 46204-2789  
Tel: (317) 233-0696 Fax: (317) 232-2554

LSA Staff:

Timothy Tyler, Attorney for the Commission  
Mark Goodpaster, Fiscal Analyst for the  
Commission

Authority: IC 33-23-10

### MEETING MINUTES<sup>1</sup>

**Meeting Date:** August 28, 2008  
**Meeting Time:** 1:30 P.M.  
**Meeting Place:** State House, 200 W. Washington  
St., Room 431  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 2

**Members Present:** Sen. Joseph Zakas; Sen. Timothy Lanane; Rep. Linda Lawson, Vice-Chairperson; Rep. Ryan Dvorak; Rep. Kathy Richardson; Chief Justice Randall Shepard; Thomas Felts; David Whicker; Kevin Kubash; Jacqueline Rowan.

**Members Absent:** Sen. Richard Bray, Chairperson; Sen. John Broden; Rep. Eric Koch.

Rep. Linda Lawson, Vice Chairperson of the Commission on Courts (Commission), called the meeting to order at 1:31 PM. Rep. Lawson stated Sen. Bray, Chairperson of the Commission, had been detained by a family emergency.

The first person to testify was Judge John Baker, Chief Judge of the Indiana Court of Appeals (Court). Judge Baker distributed the 2007 Annual Report of the Court (Handout #1) to the Commission.

---

<sup>1</sup> Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

Judge Baker said the Court had received 2,748 fully briefed cases in 2007. He added that this was a record number of cases for the Court. However, he stated that his colleagues had been able to keep up with quality and timely decisions and the Court had achieved a 100% clearance rate for the third year in a row.

Judge Baker stated that even though production was at an all time high, the Court had been able to keep up with outreach programs such as Appeals on Wheels (<http://www.in.gov/judiciary/appeals/arguments.html>).

Judge Baker said the Court was the fastest intermediate court of appeals in the United States and he was proud of the work done by the Court. Judge Baker then introduced Judge Cale Bradford and Judge Terry Crone of the Court.

Judge Crone stated he recently had a conversation with Sen. David Long concerning the need to provide better information to the electorate as part of the judicial retention election process. Judge Crone said there was much information available regarding judges standing for retention, but it was not easy to locate. Because of this, Judge Crone stated he and Judge Bradford had been working with the Division of State Court Administration to establish a retention election website.

Judge Bradford then demonstrated the website (<http://www.in.gov/judiciary/retention/>) for the Commission. Judge Bradford stated the website would include information such as biographies of judges and justices (including which governor appointed the judge or justice), opinions written by judges and justices, video of oral arguments, news articles, and external links, including links to judicial retention evaluations conducted by the Indiana State Bar Association (ISBA).

In response to questions from Commission members, Judge Bradford stated that the opinions available on the website were updated on a regular basis. He said he thought other information concerning specific judges and justices would be updated beginning about nine months before their retention election date. Judge Bradford added that the website was still "a work in progress."

The next person to testify was Rep. Ralph Foley. Rep. Foley stated he was in favor of an independent, impartial, and fair judiciary and also in ways in which the public could be informed about retention elections.

Rep. Foley said Sen. R. Michael Young had introduced Senate Joint Resolution (SJR) 1 in 2005 to amend the Indiana Constitution to, among other things, require the Governor to fill a vacancy on the Supreme Court or the Court from nominees recommended by a commission on judicial nominations and qualifications, subject to confirmation by the Indiana Senate. He said SJR 1-2005 also specified a justice's or judge's retention in office would have to be confirmed by the Senate.

Rep. Foley continued by stating SJR 1-2005 did not pass. He said in 2006 he introduced House Bill (HB) 1419 which would have required attorney commissioners to the Judicial Nominating Commission to be nominated by the Speaker of the House of Representatives and the President Pro Tempore of the Senate. He said it also would have required any recommendation of the Judicial Nominating Commission concerning the retention or rejection of a justice or judge at a retention election to be placed on the ballot.

Rep. Foley said he "dropped" HB 1419-2006 when it did not receive the bipartisan support he wanted. Rep. Foley said the Commission may want to examine the statute that creates the current Judicial Nominating Commission to try and find ways to make it more impartial

and independent. Rep. Foley also said that while the retention election website was an "excellent" idea, he felt the Commission may also want to help the public make more informed decisions by having the Judicial Nominating Commission make a recommendation concerning the retention or rejection of a justice or judge and requiring the placement of that recommendation on the ballot.

The next person to testify was Sen. Phil Boots. Sen. Boots stated he wished to discuss Indiana Trial Rule (TR) 60.5 ([http://www.in.gov/judiciary/rules/trial\\_proc/index.html#60\\_5](http://www.in.gov/judiciary/rules/trial_proc/index.html#60_5)) that allows courts to mandate the expenditure of funds by local governments. Sen. Boots stated he felt these mandates violated separation of powers provisions under the Indiana Constitution and the Indiana Code. He said that at the county level of government, he believed this power to disburse funds was given only to the county council.

Sen. Boots then discussed a 2007 Indiana Supreme Court case concerning the mandate of funds in Montgomery County (<http://www.in.gov/judiciary/opinions/pdf/09260702fsj.pdf>). Sen. Boots said the case involved the Montgomery Circuit and Superior Courts request for salary increases for court staff and the payment of the judges' attorney's fees. Sen. Boots stated that, in the case, the Supreme Court established staff salary levels and awarded the judges' attorney's fees but at lower levels than those requested by the courts.

Sen. Boots said the legislature needs to address the issue of judicial mandates. He stated if this issue wasn't addressed soon, judges could become "budget busters." He stated the power to raise and spend county funds should only be exercised by the county council. He asked the Commission to consider ways to address this issue, including constitutional amendments and amendments to the Indiana Code.

Sen. Boots then stated that one way to address the payment of attorney's fees in judicial mandate cases was to require the Attorney General to represent judges in these cases. He said since judges were state employees they should be represented by the Attorney General and not allowed to hire a private attorney.

Chief Justice Shepard then stated there were constitutional issues concerning the separation of powers present in these mandate cases. He stated that there was a constitutional edict that the courts "shall be open" and a county council could not be allowed to effectively shut down the courts in their county by withholding funds to operate the courts. Chief Justice Shepard continued by stating, however, that if the State was paying all the costs to operate courts instead of only some costs "most of this tension would just go away."

Chief Justice Shepard said TR 60.5 was originally adopted to address concerns raised by the counties themselves during the 1970's and 1980's. He stated TR 60.5 was "printed on paper, not carved in stone." He said it created a place for judges and counties to talk through these issues.

Chief Justice Shepard stated that in the last six months, representatives from the Indiana Judges Association and the Indiana Association of Counties had begun meeting to discuss issues raised by TR 60.5. He said the Supreme Court was open to restructuring TR 60.5.

Sen. Boots added that he appreciated the Chief Justice's remarks. Sen. Boots stated that he felt the current system under TR 60.5 that has a judge making a decision concerning another judge which is then reviewed by the Supreme Court was like a "fox watching the chicken house."

Andrew Berger, Legislative Director of the Association of Indiana Counties, then

introduced Larry Hesson and Ed Koerner.

Mr. Hesson stated he was President of the Hendricks County Council and had also been a judge at one time. Mr. Hesson stated that judicial mandates of funds were sometimes necessary but were more commonly a matter of finances. Mr. Hesson said a request for exorbitant legal fees could almost become a "tool of intimidation." Mr. Hesson also said it was difficult finding attorneys to represent county councils in mandate cases because they were leery of having to subsequently appear in front of the same judge they were opposing in the mandate case.

Mr. Hesson said he only knew of three judicial mandates in Indiana that had not been upheld by the Supreme Court. He said it appeared, especially to laymen, "that we're playing with a stacked deck." He said county councils have no intentions to disrupt the operation of the courts, but county councils had to treat court employees like other county employees.

Mr. Hesson said the solution to these problems ultimately resides with the legislature. He said he agreed with the Chief Justice that the State should take the responsibility for paying for the operation of the courts. He stated that the next best solution would be to require the Attorney General to represent judges in mandate cases.

Mr. Koerner then stated he was a member of the Jackson County Council and had served as county auditor from 1981 to 1988. He stated Jackson County faced a judicial mandate approximately three years ago because of cuts to county personnel insurance coverage. He said the judges in that case hired attorneys from Indianapolis that charged an hourly rate that was much higher than the going rate in Jackson County.

Mr. Koerner said the court dropped the original mandate in exchange for raises for court employees. He said problems are created when one set of county employees is treated differently from other county employees. He also said this situation could be addressed by the State taking over operation of the courts.

Mr. Berger then said he agreed that attorney's fees in mandate cases was one of the main issues in this area. He said if the Attorney General represented the judges in these cases, it would remove the "hammer" created by the potential imposition of large attorneys fees.

Mr. Berger said there was no move among counties to close down courts or restrict the independence of the judiciary. He said, however, that these court ordered mandates restrict other levels of government.

Mr. Berger stated one way for the legislature to address this situation was to specify that court employees are county employees. But, he said the best solution was for the State to take over the operation of the courts.

Rep. Kathy Richardson added that it might be difficult to draw the line between state employees and county employees in some departments of local government such as the clerk's office.

Kevin Kubash stated St. Joseph County had been subject to "a few mandates" in the past. He said when they occurred, there was always a feeling that the county was "being pressured into something." He also said treating county employees differently created "a ripple effect."

The next person to testify was Douglas Church, President of the ISBA. Mr. Church stated

he wished to testify concerning access to information for judicial retention elections.

Mr. Church said the ISBA represents 12,000 lawyers in Indiana. He said the ISBA always polled its members concerning justices and judges before retention elections occurred. He said the survey would be conducted electronically beginning this year. Mr. Church added the Hoosier State Press Association disseminates survey results to Indiana newspapers.

Mr. Church congratulated Judge Crone and Judge Bradford for their work on the retention election website. He said judges in neighboring states are raising millions of dollars to run in elections. He stated a recent trial court race in Illinois had resulted in over a million dollars being spent in campaign funds and it is not uncommon in Ohio for appellate level judicial races to result in the expenditure of many millions of dollars.

Mr. Church said an independent judiciary was vital. He stated, as John Adams said, democracy depends on a judiciary that is subservient to none. Mr. Church said the ISBA would continue to work for an independent and courageous judiciary.

The final person to testify was Judge Mark Loyd of the Johnson Circuit Court. Judge Loyd distributed a handout (Handout #2) to the Commission that contained data concerning the workload of the Johnson County courts and the increase in population in Johnson County. The handout also included letters supporting the need for additional judicial resources in Johnson County written by the Prosecuting Attorney, Chairperson of the Board of Commissioners, Chairperson of the County Council, county Clerk of the Courts, and President of the County Bar Association.

Judge Loyd said Johnson County would need one new Superior Court judge in 2012 and another one in 2016. He stated that, in addition to the growth in the population and the caseload in Johnson County, the County now also faces jail overcrowding issues and problems caused by the damage to or destruction of county buildings caused by the recent floods.

Rep. Lawson then stated that due to Sen. Bray's absence, the Commission would not set its next meeting date.

Rep. Lawson adjourned the meeting at 3:26 PM.